



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 28, 1994

Mr. James H. Verschoyle
Attorney at Law
P.O. Box 568
Atlanta, Texas 75551

OR94-828

Dear Mr. Verschoyle:

The City of Atlanta (the "city"), which you represent, has received a request for "all documents, recordings, and notes compiled in any investigation done in regards to Chief of Police Mike Scott." You ask whether this information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. You claim that sections 552.101, 552.102, 552.108, and 552.111 of the Government Code except this information from required public disclosure. We assigned your request ID# 29403.

You assert sections 552.101 and 552.102 of the Government Code in conjunction with common-law privacy.¹ Sections 552.101 and 552.102 incorporate law that is intended to protect the privacy interests of third parties. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."² Section 552.102

¹You also assert section 552.101 in conjunction with section 143.089 of the Local Government Code. Section 143.089, however, applies only to cities that have a population of 10,000 or more and have adopted chapter 143 of the Local Government Code. We understand that the city does not have a population of 10,000 or more and has not adopted chapter 143. Accordingly, section 143.089 does not apply in this instance.

²Section 552.102(b) also protects from required public disclosure transcripts from institutions of higher education in the personnel files of professional public school employees. Section 552.102(b) expressly excludes from this protection information on a transcript detailing the degree obtained and the

protects information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). *See Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the *Industrial Foundation* case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications of public employees. Open Records Decision Nos. 470, 467 (1987). Information previously held by this office not to be protected by common-law privacy interests includes, for example, applicants' and employees' educational training, kind of work, salary, and job performance or ability. *See* Open Records Decision No. 455 (1987); *see also* Open Records Decision Nos. 470, 467; 444 (1986); 421 (1984); 405 (1983). We have examined the information submitted to us for review. We conclude that it is of legitimate public concern. Accordingly, the submitted information may not be withheld from required public disclosure under sections 552.101 and 552.102 of the Government Code.³

You also claim that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 provides as follows:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure].

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure].

Gov't Code § 552.108. Traditionally, when applying section 552.108, our office has distinguished between cases that are still under active investigation and those that are closed. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, this section excepts from disclosure all information except that generally found on the first page of the offense report. *See generally* Open Records Decision No.

(Footnote continued)

curriculum pursued. *See* Open Records Decision No. 526 (1989). The requested information does not include transcripts.

³You also appear to assert sections 552.101 and 552.102 on false-light privacy grounds. We note, however, that invasion of privacy on false-light grounds is not an actionable tort in Texas. *See Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994).

127 (1976) (citing *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ ref'd n.r.e. per curiam, 536 S.W.2d 559 (Tex. 1976)). As a general matter, once a case is closed, information may be withheld under section 552.108 only if the law enforcement agency demonstrates or the information demonstrates on its face that its release "will unduly interfere with law enforcement and prevention." See Attorney General Opinion MW-446 (1982); Open Records Decision Nos. 434 (1986); 366 (1983) at 3; 216 (1978) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. Open Records Decision Nos. 434 (1986) at 2; 287 (1981) at 1-2.

You assert section 552.108 on the grounds that releasing the requested information would unduly interfere with law enforcement. Specifically, you claim that releasing the requested information would lead to harassment of or retaliation against the witnesses who provided statements in the course of the investigation. A governmental body may withhold the names and statements of witnesses if the governmental body determines:

from an examination of the facts of the particular case that disclosure might either subject the witnesses to possible intimidation or harassment or harm the prospects of future cooperation between witnesses and law enforcement officers.

Open Records Decision No. 252 (1980) at 4; *see also* Open Records Decision No. 297 (1981) at 2. A promise of confidentiality made by a law-enforcement officer in the course of an investigation into possible criminal conduct is an important factor in determining whether section 552.108 excepts information obtained from a witness. *Id.*

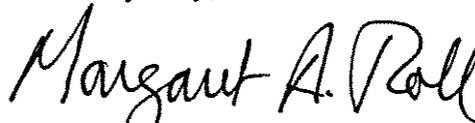
You advise us that the witness statements submitted to us for review were generated in the course of an investigation conducted by the city into allegations that the police chief consumed alcohol while on duty. You indicate that the investigation was closed "through an administrative decision of the City Manager." We understand, therefore, that this investigation was administrative in nature, did not involve a police investigation into criminal matters, and is not expected to culminate in prosecution of the police chief. Prior decisions of this office affording section 552.108 protection to information identifying or tending to identify witnesses have been limited to situations involving criminal investigations and prosecutions. *See, e.g.*, Open Records Decision Nos. 434 (1986); 297 (1981); 252 (1980). Moreover, you do not indicate that the witnesses were given a promise of confidentiality in exchange for their statements. We conclude that you have failed to demonstrate that release of the requested information would unduly interfere with law enforcement, nor do the submitted records so demonstrate on their face. Accordingly, the police department may not withhold the

requested case file from required public disclosure under section 552.108 of the Government Code.

You also claim that section 552.111 of the Government Code excepts the requested information from required public disclosure. Section 552.111 excepts from disclosure information that constitutes an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Id.* at 5-6. As the information submitted to us for review relates to an internal administrative and personnel matter, we conclude that section 552.111 does not except it from required public disclosure. Accordingly, the city must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Ref.: ID# 29403

Enclosures: Submitted documents

cc: Mr. Bill Owney
Publisher
Atlanta Citizens Journal
P.O. Box 1188
Atlanta, Texas 75551
(w/o enclosures)